TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 628

FISHER'S BLEND STATION, INC., APPELLANT,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED DECEMBER 11, 1935.

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[fol. 1] [File endorsement omitted]

IN SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. —

FISHER'S BLEND STATION, INC., a Corporation, Plaintiff,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and THOMAS S. HEDGES and T. M. JENNER, Members of said Commission, Defendants

COMPLAINT—Filed Aug. 28, 1933

Comes now the plaintiff, and for cause of action against the defendants, alleges:

I

That the plaintiff is and at all times herein mentioned was a corporation, organized and existing under and by virtue of the laws of the State of Washington, and that plaintiff has paid its annual license fee last due to the State of Washington.

II

That the defendants are members of the Tax Commission of the State of Washington, duly appointed, qualified and acting as such, and at present constitute the Tax Commission of the State of Washington, and that the Tax Commission of the State of Washington is vested with the administration of Chapter 191 of the Laws of 1933 of the State of Washington, more commonly known and hereinafter designated as the Occupational Tax, pursuant to Section 24, thereof, and is empowered to supervise the making of returns provided for therein, and the assessment and collection of taxes and penalties imposed thereunder.

[fol. 2]

III

That the Occupational Tax, Substitute House Bill No. 92, was passed by the Legislature of the State of Washington on March 9, 1933, and received the approval of the Gov-

ernor of the State of Washington on March 21, 1933, and took effect immediately as being necessary for the immediate support of the State government and its existing public institutions, as stated in Section 31 thereof, and thereupon became Chaper 191 of the Laws of 1933 of the State of Washington, which law states in Section 2, Subdivision 2 thereof:

"From and after the first day of August, 1933 and until the thirty-first day of July, 1935 there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows:

. . . . . .

"(ed) Upon every person engaging in or continuing within this State in the business of radio broadcasting; as to such persons the amount of the tax or excise shall be equal to the gross income of the business, multiplied by the rate of one per cent."

That the terms "person", "gross income" and "business" are defined in Section 1, Subdivisions 4, 6, and 7 respectively thereof, as follows:

"(4) The word 'person' or the word 'company', herein used interchangeably, shall mean and include any individual, firm, copartnership, joint venture, association, corporation, trust or any other group or company acting as a unit, whether mutual, cooperative or otherwise.

"(6) The term 'gross income' means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without [fol. 3] any deduction on account of losses: Provided, the term 'gross income' shall not include any payments re-

ceived on accounts or notes outstanding at the time this act goes into effect.

"(7) The word 'business' shall include all activities engaged in with the object of gain, benefit or advantage either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in taxable in the class in which it falls."

IV

That the plaintiff owns and operates Radio Station KOMO, located in Seattle, Washington, with an assignment of 920 kilocycles and 1000 watts power; that plaintiff leases Radio Station KJR, located in Seattle, Washington, from the National Broadcasting Co. Inc., and Northwest Broadcasting System, Inc., and operates the same with an assignment of 970 kilocycles and 5000 watts power; and that, therefore, plaintiff is engaged in the business of radio broadcasting.

That plaintiff operates said Station KOMO by virtue of a license issued it by the Federal Radio Commission of the United States of America on February 10, 1933, a copy of which is hereto attached marked Exhibit "A" and by specific reference made a part hereof, in accordance with sections 4 and 5 of the Federal Radio Act of 1927 as amended (47 U. S. C. A. Sec-. 84 and 85), and the regulations of said Commission, bearing file No. 5-R-B-63 and Official No. 63, which license assigns said station the call letters KOMO and the radio frequency of 920 kilocycles with a power of 1000 watts, and further states that

"a licensee shall, during the term of this license, render such broadcasting service as shall serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

"* * * This license is subject to the right of use or control by the government of the United States conferred by Section 6 of the Radio Act of 1927."

[fol. 4] That plaintiff operates said Station KJR by virtue of a similar license issued it by the Federal Radio Commission of the United States of America on July 11, 1933, a copy of which is hereto attached marked Exhibit "B" and

by specific reference made a part hereof, which license bears file No. 5-R-B-67 and Official No. 67, and assigns said station the call letters KJR and the radio frequency of 970 kilocycles with a power of 5000 watts, and contains the same provisions hereinabove quoted from the license issued to Station KOMO.

V

That the art of radio broadcasting consists in transmitting electro-magnetic waves set in motion by electricity at a station, such as plaintiff's stations KOMO and KJR, and passing through space to numerous receiving instruments; that the essential elements in such communications consist of the transmitter, the connecting medium or "ether" and the receiving mechanism; that electro-magnetic waves move at the speed of light and it is not only impracticable but impossible to confine them, at least in the present state of the art, within state lines; that the receiving mechanism or receiving set detects the oncoming radio waves and amplifies them into audible sound; that all radio communication, anywhere in the United States, travels actually or potentially across state lines, and even if certain radio electric wave energy, through an accident or otherwise, should lose its force before crossing the state line, yet it potentially interfer-s with other radio communications passing interstate; and that Congress under the authority conferred upon it by Section 8, Article I of the Constitution of the United States, has assumed control of all communications by radio by the Federal Radio Act of 1927 as amended (47 U. S. C. A. sections 81-121), acting through the Federal Radio Commission, which actively and continuously supervises all such radio communications.

VI

That as a practical matter and for commercial purposes [fol. 5] the United States has been divided by the Federal Radio Commission, acting pursuant to Section 2 of the Federal Radio Act of 1927 (47 U. S. C. A. section 82) into five zones, of which the fifth zone embraces the following states and territories: Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, California, Territory of Hawaii and Alaska.

That the Federal Radio Commission has assigned, pursuant to Section 4 of the Federal Radio Act of 1927 (47

U. S. C. A. section 84) certain quotas for each of said five zones, as set forth in Regulation No. 111 of the Federal Radio Commission, which said quotas limit and designate the radio frequency bands, types of stations and their power for each of said zones; that the radio frequencies assigned to the several radio stations in said zones represent bands of wave lengths to be used only by certain designated stations therein; that these radio frequency bands are designated as Clear Channels, High-powered Regional frequencies, Regional frequencies and Local frequencies, as set forth in Regulations Nos. 70 to 75 inclusive and Nos. 116 to 124 inclusive of the Federal Radio Commission; and that they are so assigned so as to eliminate as much interference as possible between stations on the several radio frequency bands and in the several zones.

That a Clear Channel station is assigned a radio frequency band by the Federal Radio Commission which no other station in the United is to use at the same time and, therefore, is designed and calculated for the effective transmission of radio broadcasting over the entire area of the United States and is also assigned sufficient power to adequately broadcast in that manner; that a Regional station is assigned a radio frequency band by the Federal Radio Commission for the effective transmission of radio broadcasting over the zone in which it is located and, therefore, is designed and calculated for the effective transmission of radio broadcasting over the entire area of the zone in which it is located and is also assigned sufficient power to adequately broadcast in that manner; that the radio frequency of 970 kilocycles assigned to Station KJR is a Clear Channel assigned to the fifth zone; and that the radio frequency of 920 kilocycles assigned to Station KOMO is a Regional frequency assigned to the fifth zone.

[fol. 6] VII

That in truth and in fact Stations KOMO and KJR have been and now are engaged in broadcasting commercially in said manner over said Regional Channel of 920 kilocycles and said Clear Channel of 970 kilocycles, respectively; that said broadcasting has covered said designated areas and also certain parts of the High Seas adjacent thereto and certain parts of the Dominion of Canada, particularly the Province of British Columbia, and that such broadcasting

has been continuous and effective and has constituted the conduct of a valuable and remunerative business for the plaintiff, has furnished an effective and valuable medium of advertising to many forms of industry, particularly those interested in merchandising, wholesale and retail, upon an international, national and regional scale, and has served the listening public in said territories faithfully with many educational and entertaining features.

VIII

That the buisness of radio broadcasting has become an industry of enormous proportions, and that it has become an important factor in the business as well as the lives of the American people, financially, socially, economically and politically.

That stations KOMO and KJR are links in a system of National and Pacific Coast broadcasting in that they relay the National and Pacific Coast broadcasts of the National Broadcasting Compny, Inc. which broadcasts take precedence over all programs originating at said stations; that said National Broadcasting Company, Inc. is a corporation engaged in the business of broadcasting commercial programs, entertainment features and news over the entire United States; that the facilities of the said National Broadcasting Company, Inc. are used by the government of the United States as occasion requires for communications from the President of the United States and other officials directly to the people; that the facilities of said stations are available to the Federal government, pursuant to Section 6 of the Radio Act of 1927 (47 U. S. C. A. section 86) and the provisions of the station licenses hereinabove set forth, [fol. 7] in times of national emergency upon proclamation of the President of the United States; and that, pursuant to Section 22 of the Radio Act of 1927 (47 U. S. C. A. section 102), the facilities of said stations are made available for distress signals of ships on the High Seas and broadcasting from said stations is regulated so as not to interfere with the same.

IX

That the value of the operating systems of said stations KOMO and KJR is approximately $600,000.00, said valuation including real estate, furniture and fixtures, technical

equipment and goodwill of the business; that the gross income from the business conducted by said stations was over $300,000.00 for the year 1932 and over $100,000.00 for the period from January 1, 1933, to July 15, 1933, and that said gross income arises out of payments made by the National Broadcasting Company, Inc. for the broadcasting of said National and Pacific Coast programs, in the manner hereinabove described, and payments made by commercial advertisers, for programs originating at stations KOMO and KJR and other stations situate in other states, such as KGW in Portland, Oregon, connected by wire with stations KOMO or KJR, who desire to reach the listening public in the areas and territories hereinabove described.

X

That Section 6 of the Occupational Tax Act requires plaintiff to make monthly reports and monthly payments, the first of which is due September 15, 1933, for the tax imposed by the Act for the month of August, 1933, to the defendants, which said reports set forth the information necessary for the calculation of the tax by the defendants as based on the gross income of plaintiff's business; and that heavy penalties are imposed for failure to make such reports or payments, to wit:

(a) 10% of the assessed tax to be added thereto as a penalty (Sec. 10 of the Act).

(b) 1% per month of the amount of the tax until paid to be added thereto (Sec. 10 of the Act).

[fol. 8] (c) The defendants may order the sheriff of any county to levy upon all the real and personal property of plaintiff for the payment of the tax (Sec. 15 of the Act).

(d) Defendants may instruct the Attorney General of the State of Washington to restrain plaintiff from engaging or continuing in the business of radio broadcasting until the tax assessed is paid (Sec. 17 of the Act).

(e) It is unlawful for plaintiff to fail or refuse to make said returns and plaintiff would be guilty of a gross misdemeanor and punishable in the manner provided by law for not making such returns (Sec. 23 of the Act).

(f) Defendants have the power to summon any person to testify as to any information which they might require

with reference to the imposition of the tax, and, upon refusal to obey such summons, such person will be liable to contempt of court proceedings (Sec. 25 of the Act).

XI

That plaintiff while engaging or continuing in the business of radio broadcasting, as hereinabove described, is engaged solely in foreign and interstate commerce and that the operation of the Occupational Tax Act, insofar as this plaintiff is concerned, constitutes a tax or excise upon the privilege of engaging or continuing to engage in interstate and foreign commerce which amounts to a regulation and direct burden thereon and, therefore, is repugnant to, in conflict with and contravenes Section 8, Article I of the Constitution of the United States, which states that Congress shall have power

"* * * to regulate commerce with foreign nations and among the several states and with the Indian tribes * * *."

XII

That the Occupational Tax Act taxes some occupations and businesses, including plaintiff's, and not others; that it fixes different rates for different business activities, as set forth in the several sections of the Act, even though the Act, as stated in Section 2, Subdivision 2 thereof, hereinabove quoted in Paragraph III, imposes a tax on all business activities as one class, in that Section 2, Subdivision 2 (ba) exempts by the Governor's veto

[fol. 9] "* * * every person engaging or continuing within this State in the business of growing or raising for sale, profit or use, any article, substance, commodity or crop * * *."

and Section 2, Subdivision 2 (f) exempts by the Governor's veto

"* * * every person engaging in or continuing within this State in any business not included in the preceding subdivisions of this section and upon every person engaging or continuing in this State in the business of rendering, performing or selling services, professional or otherwise * * *."

That these vetoes exempt, from the operation of the Act, lawyers, doctors, professional men of every kind, agricultural business and all those engaged therein; and that the Occupational Tax Act, therefore, is in violation of the Fourteenth Amendment to the Constitution of the State of Washington in that it imposes a direct property tax on plaintiff which is not uniform upon the same class of property, to-wit, all business activities, within the same territorial limits and discriminates against plaintiff in the fixing of said different rates in the same class.

XIII

That the Occupational Tax Act, construed as a property tax, is also unconstitutional and void as applied to plaintiff, because it violates and is repugnant to the Seventh Amendment to the Constitution of the State of Washington, which prohibits the Legislature from amending or repealing an initiative measure within two years after its enactment, in that Chapter 4 of the Session Laws of 1933 of the State of Washington, commonly known as the 40 Mill Law, adopted as Initiative Measure No. 64 on December 8, 1932 limits taxation for state purposes at 5 mills on assessed valuation, or one-half of one per cent; and that, inasmuch as assessed valuation is established by statutory enactment as 50% of the valuation of the property, the limitation upon property levies for state purposes is in fact one-quarter of one per cent of the actual value of the property; that the rates to be applied on the gross income of plaintiff, as set forth in Paragraph III herein, under the Occu- [fol. 10] pational Tax Act exceed said figure; and that the Act, therefore, conflicts with the 40 Mill Law and, to the extent of the conflict, impliedly repeals it contrary to the said Seventh Amendment to the Constitution of the State of Washington.

XIV

That, even though the Occupational Tax Act is interpreted as an excise and not a property tax, the Act, as applied to plaintiff, by reason of the capricious and arbitrary omissions therefrom, without relation to the purposes thereof, of the classes of business activities described hereinabove in Paragraph XII, despite the fact that said Section 2, Subdivision 2 of the Act states the purpose of the

Act to be to levy "an annual tax or excise for the privilege of engaging in business activities" and defines the words "person" and "business", as quoted hereinabove in Paragraph III, as including all individuals, partnerships and corporations engaged in any activity, with the hope of gain, benefit or advantage either direct or indirect, is unconstitutional and void because it violates and is repugnant to Section 1, Article XIV of the Constitution of the United States, in that it abridges the privileges and immunities guaranteed plaintiff and denies it the equal protection of the laws; and that the Act, as so applied to plaintiff, is unconstitutional and void because it violates and is in conflict with Section 12, Article I of the Constitution of the State of Washington, which guarantees plaintiff the equal protection of the Laws and which forbids special privileges and immunities.

That, furthermore, the Act is unconstitutional and void, with reference to said provisions of the Constitution of the United States and the Constitution of the State of Washington, in that gross income is defined differently for persons in the same class (the same class being all business activities), to wit, Section 2, Subdivision 5½ of the Act, defines gross income for National Banking Associations, State Banks, Trust Companies, Mutual Savings [fol. 11] Banks, Building & Loan or Savings and Loan Associations, Stock Brokers and Security Houses and Financial Companies engaged in the business of loaning money on retail sales or all discounted or rediscounted conditional or other sales contracts, as follows:

"as to any person exercising any privilege taxable under schedules I, II, or XIII of Sec. 2 (2) (e) the term 'gross income' shall be construed to mean the gross earnings of the business from interest, discount, rentals, royalties, fees or other emoluments however designated."

That said definition of gross income is different and more favorable to said businesses than the definition of gross income, hereinabove quoted in Paragraph III, which is applicable to plaintiff's business of radio broadcasting.

XV

That the definition of "gross income", hereinabove set forth in Paragraph III, is so vague and uncertain as to

render the Occupational Tax Act, as applied to plaintiff, inoperative and void; that plaintiff is entitled to know definitely and certainly the amount of tax which it is required to pay and the method of its ascertainment without the expense of litigation necessary to determine either; that different and vitally conflicting views will arise out of the interpretation of the language of said definition, particularly with reference to the meaning of the word "value" as to whether it imports "cost price", "sale price" or "net profit" on the sale of the services of the plaintiff in its business of radio broadcasting and particularly as to how to determine the value proceeding or accruing from the sale of services rendered by plaintiff in said business by reason of the investment of capital therein as distinguished from managerial skill employed therein for the reason that said definition purports to include only the value from the sale of such services actually received by reason of the investment of capital in the business.

That the rule by which the tax imposed on plaintiff is to be measured should be definite and certain and its definite-
[fol. 12] ness and certainty should appear from the provisions of the Act itself and not be the product of either litigation or compromise; and that by reason thereof the Occupational Tax Act, as applied to plaintiff, which necessitates the making of returns and payments and imposes severe penalties, hereinabove set forth, for the failure so to do, is unconstitutional and void, in that it violates and is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 3, Article I of the Constitution of the State of Washington, which state- that no person shall be deprived of property without due process of law.

XVI

That the defendants threaten to enforce the provisions of said Act and the penalties thereof against plaintiff; that in the event they do so plaintiff will be subjected to unjust and illegal exactions and onerous penalties; that the provisions of the Act, insofar as they are applied to and affect plaintiff, are wholly nugatory and void for the reasons hereinabove set forth; that the contention that the right of plaintiff to continue and engage in the business of radio broadcasting is dependent upon the payment of the taxes

imposed by the Act, will seriously embarrass it in the conduct of said business and subject it to harassment and annoyance and will necessitate a multiplicity of suits and prosecutions for the recovery of said monthly payments and penalties.

That such contention and threatened enforcement will embarrass plaintiff in the making of contracts with its patrons in that doubts will be cast upon the plaintiff's right to continue in business and to perform said contracts and pleas of illegality may be asserted by the contractees by reason of the fact that plaintiff has failed and refused to comply with the requirements of the Act and of the defendants attempting to enforce it; that this harassing and annoying burden will rest upon the plaintiff in the operation of its business despite the fact that said Act, as applied [fol. 13] to plaintiff in the conduct of its business, is in fact unconstitutional and void under the several provisions of the Constitution of the State of Washington and the Constitution of the United States hereinabove set forth; and that, until there has been a final and conclusive adjudication of the constitutionality or unconstitutionality of the Act, in the light of the constitutions of the United States and the State of Washington, as applied to plaintiff's business, the fact that it is upon the statute books and that the defendants are threatening or seeking to enforce it against plaintiff will create a condition of uncertainty and jeopardy in the conduct of the business of plaintiff, which will substantially and materially affect the same.

XVII

That amenable to the same provisions of the Occupational Tax Act, as are applicable to plaintiff, are many other individuals, partnerships or corporations operating radio stations situate in the State of Washington, but which are scattered throughout said State, and, unless in this or some other action brought for the same purpose there shall be a judicial determination of the constitutionality or unconstitutionality of the Act, as applied to such persons, in the light of the Constitutions of the United States and the State of Washington, these persons, in order to protect themselves from such an unlawful and void tax, will be compelled to each initiate and carry through his or its individual appeal to the courts for protection; that this

condition will necessarily result in a multiplicity of suits, and that plaintiff brings this action not only in its own behalf but also on behalf of all others similarly situated who may join it as plaintiffs in this action.

XVIII

That Section 13 of the Occupational Tax Act states that an injunction or restraining order may issue to restrain and enjoin the collection of any tax or penalty imposed thereunder, or any part thereof, upon the ground that the [fol. 14] assessment thereof is in violation of the Constitution of the United States or that of the State of Washington.

That by reason of the facts as herein alleged, plaintiff has no adequate remedy at law; and that, unless equitable relief by injunction, temporary and permanent, is granted by this court, plaintiff will be deprived of its lawful rights as herein alleged.

Wherefore, plaintiff prays judgment and decree of this court, as follows:

1. That defendants and each of them, individually and as the Tax Commission of the State of Washington, and any associate commissioner, and their agents, servants and employees, be forever enjoined and restrained from enforcing, as against this plaintiff, the said Occupational Tax Act, or any portion thereof, from claiming taxes thereunder as due or to become due from plaintiff, from imposing any penalty on plaintiff, and from attempting, directly or indirectly, to collect any tax thereunder from plaintiff.

2. That, pending the determination of this suit, the defendants and each of them, individually and as the Tax Commission of the State of Washington, and any associate commissioner, be required to show cause, on a day certain to be fixed by this court, why a temporary injunction should not issue against defendants and each of them, individually and as the Tax Commission of the State of Washington, and any associate commissioner, and against their agents, servants and employees, restraining and enjoining them from enforcing, as against this plaintiff, the said Occupational Tax Act, or any portion thereof, from claiming taxes thereunder as due or to become due from plaintiff, from

imposing any penalty on plaintiff, and from attempting, directly or indirectly, to collect any tax thereunder from plaintiff.

3. That plaintiff do have and recover its costs and disbursements herein.

[fol. 15] 4. That plaintiff have such other and further relief as to the court may seem just and proper.

Venables, Graham & Howe, Bernard Goodwin, Attorneys for Plaintiff.

Duly sworn to by Birt F. Fisher. Jurat omitted in printing.

[fol. 16] EXHIBIT "A" TO COMPLAINT

UNITED STATES OF AMERICA:

Federal Radio Commission

Radio Broadcasting Station License

File No: 5-R-B-63. Official No: 63. Call Letters: KOMO.

Subject to the provisions of the Radio Act of 1927, as amended, subsequent acts, and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to conditions set forth in this license, the Licensee—Fisher's Blend Station, Inc.—is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning 3 am E.S.T. March 1, 1933, and ending 3 am, E.S.T. September 1, 1933.

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 920 Kc.

2. With power of 1 kilowatts, with an additional XXXX watts ((a) from local sunrise to local sunset only.
((b) for experimentation to determine whether interference results.
((c)

Height of Antenna (from ground or counterpoise to highest point of Antenna) xx meter.

Antenna current 8.5 Amperes. Antenna resistance 13.9 ohms.

3. During the following period or periods of time: Unlimited time.

4. Under the call letters: KOMO

5. With the main studio of the station located at: Fourth Avenue and University Street, Seattle, Washington.

The apparatus hereinabove authorized to be used and operated is located at:

West Waterway, Harbor Island, Seattle, Washington, Lat. 47° 34′ 30″ North, Long. 122 21 24 West,

and is described as follows: Western Electric Type D-87737 Broadcasting Transmitter. Serial No. 117. Direct Crystal Control. Last radio stage: one 5 kilowatt vacuum tube (WE 228-A). Low level modulation. Maximum rated carrier power output 1 kilowatt. Antenna: Type Inverted "L"; length 12′; height 154′; direct ground; towers guyed wooden poles.

For emergency purposes only, when by reason of breakdown or similar reason the said apparatus can not be used, the licensee is authorized to use and operate (but only in accordance with the terms and conditions of this license) the auxiliary radio transmitting apparatus located at:

* * * * * * *

and described as follows:

* * * * * * *

[fol. 17] The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are

true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Radio Act of 1927 as amended. This license is subject to the right of use or control by the Government of the United States conferred by Section 6 of the Radio Act of 1927.

Dated this 10th day of February, 1933.

By the direction of the Federal Radio Commission.

James W. Baldwin, Secretary.

(Seal)

[fol. 18] EXHIBIT "B" TO COMPLAINT

UNITED STATES OF AMERICA:

Federal Radio Commission

Radio Broadcasting Station License

File No. 5-R-B-67. Official No. 67. Call Letters: KJR

Subject to the provisions of the Radio Act of 1927, as amended, subsequent acts, and treaties, and all regulations heretofore or hereafter made by this Commission, and, further subject to conditions set forth in this license, the Licensee—Fisher's Blend Station, Inc.—(Lessee)—is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning—3 am E.S.T. August 1, 1933, and ending—3 am E.S.T. February 1, 1934.

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 970 kc.

2. With power of 5 kilowatts, with an additional xxx

((a) from local sunrise to local sunset only.
((b) for experimentation to determine whether interference results.
((c)

Height of Antenna (from ground or counterpoise to highest point of Antenna)

xxxxx meters.

Antenna current xxx amperes.

3. During the following period or periods of time: Unlimited time.

4. Under the call letters KJR

5. With the main studio of the station located at: Skinner Building, 1326 Fifth Ave., Seattle, Wash.

The apparatus hereinabove authorized to be used and operated is located at:

185th Street and 15th Avenue N.E., Lake Forest Park, near Seattle, Wash., Lat. 47° 47′ 15″ North, Long. 122 18 30 West,

and is described as follows: Composite—Broadcasting Transmitter. Direct Crystal control.

Last radio stage: two 10 kilowatt vacuum tubes (W.E. 220-B). Low level modulation. Maximum rated carrier power output 5 kilowatts.

For emergency purposes only, when by reason of breakdown or similar reason the said apparatus can not be used, the licensee is authorized to use and operate (but only in accordance with the terms and conditions of this license) the auxiliary radio transmitting apparatus located at:

* * * * * * *

[fol. 19] and described as:

* * * * * * *

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the

Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Radio Act of 1927 as amended. This license is subject to the right of use or control by the Government of the United States conferred by Section 6 of the Radio Act of 1927.

Dated this 11th day of July, 1933.

By direction of the Federal Radio Commission.

John B. Reynolds, Acting Secretary. (Seal.)

cgb.

[fol. 20] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

INJUNCTION PENDENTE LITE—Filed Sept. 14, 1933

This matter coming on duly and regularly for hearing on the 15th day of September, 1933, pursuant to that certain Order to Show Cause heretofore issued herein on the 28th day of August, 1933, returnable on the 15th day of September, 1933, at 9:30 A.M. before this court, the plaintiff appearing by its attorneys, Venables, Graham & Howe and Bernard Goodwin, and defendants by their attorneys, G. W. Hamilton, Attorney General, and E. P. Donnelly, Assistant Attorney General, and the court being fully advised in the premises,

Now therefore, upon stipulation of the parties on file herein,

It is hereby ordered that that certain Restraining Order, heretofore issued herein on the 28th day of August, 1933, restraining and enjoining defendants from enforcing, as against the plaintiff, the Occupational Tax Act, Chapter 191 of the Laws of 1933 of the State of Washington, or any portion thereof, from claiming taxes thereunder as due or to become due from plaintiff, from imposing any penalty on plaintiff, and from attempting, directly or indirectly, to collect any tax thereunder from plaintiff, be continued in full force and effect pendente lite and that said defendants, individually and as the Tax Commission of the State of [fol. 21] Washington, and any associate commissioner, and their agents, servants and employees, be and they are hereby enjoined and restrained, during the pendency of this action, or until the further order of this court herein, from enforcing, as against plaintiff, the said Occupational Tax Act, or any portion thereof, from claiming taxes thereunder as due or to become due from plaintiff, from imposing any penalty on plaintiff, and from attempting, directly or indirectly, to collect any tax thereunder from plaintiff.

This Injunction Pendente Lite will be issued by the Clerk of this Court, pursuant to the stipulation of the parties on file herein and the consent of the General Casualty Company of America, surety on plaintiff's Temporary Restraining Order bond in the sum of $500.00 on file herein, to have said bond remain in full force and effect to pay all damages and costs which may accrue to defendants by reason of said Injunction Pendente Lite to the extent of said sum; and that no other or additional bonds shall be required.

Done in open court this 14 day of September, 1933.

D. F. Wright, Judge.

Presented by: E. P. Donnelly, Asst. Atty. Genl.

[fol. 22] In Superior Court of Thurston County

[Title omitted]

Demurrer—Filed Oct. 10, 1933

Come now defendants and demur to plaintiff's complaint in this case on the ground and for the reason that the same

does not contain facts sufficient to constitute a cause for action.

G. W. Hamilton, Attorney General. E. P. Donnelly, Assistant Attorney General.

Service acknowledged Oct. 7, 1933. Venables, Graham & Howe and Bernard Goodwin.

[File endorsement omitted.]

[fol. 23] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

STIPULATION AS TO ADDITIONAL FACTS—Filed July 10, 1934

It is hereby stipulated between the above named plaintiff, by its attorneys, Venables, Graham & Howe, and the above named defendants, by their attorneys, G. W. Hamilton, attorney general for the State of Washington, and E. P. Donnelly, assistant attorney general, as follows:

I.

That plaintiff's complaint shall be amended by this stipulation to include therein the following paragraph, which shall be paragraph IX-½ of said amended complaint:

"That the plaintiff, in engaging in the business of radio broadcasting as herein described, sells time to its customers at a charge of so much per minute of the time consumed. Plaintiff is required by the regulations of the Federal Radio Commission to occupy all time allot-ed to it in broadcasting and when not broadcasting for one of its customers, as above described, is required to furnish broadcasting programs and does so in the following way:

(a) By broadcasting a program emanating from its own studios.

(b) By purchasing a program broadcast by one of the chain systems and brought to plaintiff's studios by wire.

Such program is generally known as a sustaining pro-
[fol. 24] gram.

That the revenues of the plaintiff arising from the business of radio broadcasting come from the following sources:

(a) From the National Broadcasting Company or other chain broadcasting companies for the use of plaintiff's broadcasting facilities in broadcasting programs, including advertising, originating outside of the State of Washington and transmitted to plaintiff's broadcasting station by wire.

(b) From persons, firms or corporations, for the use of plaintiff's broadcasting facilities in broadcasting programs, including advertising and announcements originating in plaintiff's studios or transmitted to plaintiff's studios such programs and announcements being broadcast only by plaintiff's stations.

(c) From persons, firms or corporations for use of plaintiff's broadcasting facilities in broadcasting programs, including advertising, which are simultaneously broadcast from plaintiff's stations and transmitted by wire to other radio stations located within the State of Washington, for broadcast from such stations.

(d) Same as (c) except the word 'within' changed to 'without'.

That a large number of persons, the exact number of which is unknown to either party, listen to the broadcasts from plaintiff's stations; that many such listeners reside out of the State of Washington, but a substantial portion of such are resident within the State of Washington."

[fol. 25]

II

That the demurrer interposed to the original complaint shall be deemed to be interposed to the complaint as so amended, and noted and submitted for hearing by the court at the earliest convenience of the parties.

Dated this 5th day of July, 1934.

Fisher's Blend Station, Inc., by Venables, Graham & Howe, its Attorneys. The Tax Commission of the State of Washington and Thomas S. Hedges and T. M. Jenner, Members of said Commission, by G. W. Hamilton, Atty. Genl., E. P. Donnelly, Asst.

[fol. 26] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 15138

FISHER'S BLEND STATION, INC., a Corporation, Plaintiff,

v.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and THOMAS S. HEDGES and T. M. JENNER, Members of Said Commission, Defendants

ORDER OVERRULING DEMURRER AND JUDGMENT AND DECREE GRANTING PERMANENT INJUNCTION—Filed July 27, 1934

This cause having come on to be heard before the court on 24th day of Oct. 1934, upon the demurrer of defendants and upon the stipulation of counsel on file herein and stipulation made in open court, as hereinafter noted, the Plaintiff being represented by Venables, Graham & Howe, and the Defendants, The Tax Commission of the State of Washington and Thomas S. Hedges and T. M. Jenner, members of said commission, appearing by the Honorable G. W. Hamilton, Attorney General for the State of Washington, and E. P. Donnelly, Assistant Attorney General, and Alfred Harsch, Attorney for said Commission, and it appearing that the Plaintiff, having heretofore filed herein its verified complaint, and the Defendants having appeared and filed demurrer thereto, which demurrer was argued, considered and overruled on the 1st day of December, 1933, and thereafter, on the 10th day of July, 1934, counsel for the respective parties filed herein their stipulation in writing providing that Plaintiff's complaint be amended thereby to include, as paragraph XI½ of said complaint, a paragraph setting forth certain additional facts in said stipulation set [fol. 27] forth, that the demurrer interposed to the original complaint be deemed interposed to the complaint as so amended, and said demurrer to the amended complaint having come on for hearing on this date and been submitted to the court for decision, and the court having considered the same, and being fully advised overruled said demurrer to the amended complaint, and counsel for the Defendants having thereupon announced in open court that they elected

to stand upon their demurrer and refused to plead further, and the parties having stipulated in open court that said cause might be submitted to the court for final determination upon the allegations of the complaint as an agreed statement of facts, and the court having heard the argument of counsel, and being fully advised in the premises,

Now, therefore, it is ordered, adjudged and decreed:

That the defendants, and each of them, and any associate Commissioner who may hereafter be appointed to said Tax Commission their successors, agents and employes, be and they are hereby permanently enjoined and restrained from enforcing as against the Plaintiff herein the Occupational Tax Act, Chapter 191 of the Laws of 1933 of the State of Washington, or any portion thereof, from claiming taxes thereunder as due or to become due from the Plaintiff, and from imposing any penalty on the Plaintiff, and from attempting, directly or indirectly to collect any tax thereunder from the Plaintiff.

That that certain bond of injunction filed herein by the Plaintiff upon its application for a temporary restraining order herein and which was continued in force pendente lite by an order entered herein on the 14th day of September, 1933, wherein the plaintiff herein, Fisher's Blend Station, Inc., a corporation, is the principal, and the General Casualty Company of America, is the surety, being bond num-
[fol. 28] ber 5163, be and the same is hereby fully exonerated.

That the plaintiff do have and recover its costs and disbursements herein to be taxed.

To all of which Defendants except and their exceptions are allowed.

Done in open Court this 27th day of July, 1934.

D. F. Wright, Judge.

Presented by —— ——.

[fol. 29] In Superior Court of Thurston County

[Title omitted]

Notice of Appeal—Filed Aug. 7, 1934

To Fisher's Blend Station, Inc., a corporation, plaintiff, and to Messrs. Venables, Graham & Howe, its attorneys:

You, and each of you, will please take notice that the defendants above named hereby appeal to the Supreme Court

of the State of Washington from the order over-ruling demurrer and judgment and decree granting permanent injunction entered in this cause and court on the 27th day of July, 1934, and from each and every part of said final order and decree.

Dated at Olympia, Washington, this 1st day of August, 1934.

G. W. Hamilton, Attorney General. E. P. Donnelly, Assistant Attorney General.

Copy of within notice of appeal received and due and regular service thereof admitted this 2nd day of August, 1934.

Venables, Graham & Howe, Attorneys for Plaintiff & George Guttormsen.

[File endorsement omitted.]

[fol. 30] IN SUPREME COURT OF WASHINGTON

Department One

No. 25302

FISHER'S BLEND STATION, INC., a Corporation, Respondent,

v.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and THOMAS S. HEDGES and T. M. JENNER, Members of Said Commission, Appellants

OPINION—Filed May 27, 1935

Plaintiff, a domestic corporation, operates two radio stations in the city of Seattle, and instituted this action for the purpose of enjoining the defendants, the members of the tax commission of the State of Washington, from enforcing against plaintiff an occupation tax, pursuant to Laws of 1933, chapter 191 (Rem. Rev. Stat., Sec. 8326-1 to 8326-30, inc.). In its complaint, plaintiff alleged that it was engaged solely in the business of radio broadcasting; that this occupation constitutes interstate commerce; and that the tax sought to be levied against plaintiff amounting under the

statute to one per cent of plaintiff's gross income, constitutes an illegal and unconstitutional burden upon interstate commerce, and that plaintiff is not liable to pay the same.

Plaintiff also alleged its operation of the two stations—one as owner, the other as lessee—pursuant to licenses issued by the Federal Radio Commission, subject to use and control by the Federal Government, in accordance with Federal statutes, and under call letters, radio frequencies and watt power as fixed by the Federal Commission. Plaintiff further alleged that its two radio stations were broadcasting commercially, covering a designated area embracing [fol. 31] the state of Washington and several other states of the Union, besides certain parts of the Dominion of Canada and an area of the Pacific ocean; that such broadcasting from plaintiff's stations has been continuous and effective, and constitutes a valuable and remunerative business; that the facilities of plaintiff's stations are greatly in demand, the stations forming links in a system of national and Pacific coast broadcasting; and that the value of the operating systems of the two stations is approximately six hundred thousand dollars.

Defendants demurred to plaintiff's complaint, and, upon their demurrer being overruled, the complaint was amended by a stipulation containing certain agreed statements of fact. Defendants renewed their demurrer to the amended complaint, and, upon their second demurrer being overruled, elected not to plead further, whereupon a decree was entered granting the prayer of plaintiff's complaint and permanently enjoining defendants from levying the tax against plaintiff, from which decree defendants have appealed.

Respondent contends that it is engaged solely in interstate commerce, and that a tax upon the gross receipts derived from radio broadcasting amounts to a tax upon interstate commerce and cannot be collected, the same being in contravention of the commerce clause of the constitution of the United States.

Appellants assign error upon the overruling of their demurrer, and upon the entry of a decree permanently enjoining them from levying a tax upon respondent in an amount equal to one per cent of the gross income received by respondent from its activities as operator of the two radio stations.

By Sec. 5 of the act, it is provided that, in computing the amount of the tax, there shall be excepted from gross proceeds such portion thereof as may be derived from business which the state of Washington is, by the constitution [fol. 32] or laws of the United States, prohibited from taxing. Appellants concede that gross income derived from interstate business cannot be considered in computing the tax. As respondent has no income save from its two stations, the question is squarely presented: Is such a tax as is here under attack, when levied upon the gross income of radio broadcasting stations, a burden upon interstate commerce, or does broadcasting, for the purposes of the statute above referred to, constitute intrastate business, upon which the state is entitled to receive the tax provided for by statute?

It is, of course, manifest that broadcasting stations and the operation thereof, whether commercial or private, must be under the control of the Federal government. The electromagnetic waves released from such stations pass through space to varying distances, at approximately the speed of light, registering here and there as they go upon different receiving appliances properly attuned to transmute the waves into audible sound. The ether which surrounds us and serves as a connecting medium between the broadcasting mechanism and the receiving point recognizes no state or national boundary, and, indeed, we know not whether the activity of the magetic vibrations is limited merely to the atmosphere which surrounds our planet. It must be admitted that in their activities the waves which are intentionally released by broadcasting stations in the course of their business are, in their field of activities, essentially interstate and international. Radio broadcasting, then, whether commercial or private, from its very nature must be under the control of the Federal authorities, and the Congress, undoubtedly, has the constitutional prerogative to control the same. In time of war or calamity the activities connected with radio must be, on the one hand, at the service of the government for its purposes, and, on the other, used by private individuals only as may be permitted under [fol. 33] regulations necessary to preserve the public safety. Federal control of broadcasting is essential, also, in order that stations may operate without undue interference from other stations, and that lanes and zones may be carved out

of the ether, thereby allowing each station to function to a maximum of advantage and with a minimum of interference. It must be conceded that, once the magnetic waves are released from a broadcasting station, they become an interstate and international activity, or energy, and in the present state of the art are, generally speaking, subject to no human control, save, of course, that they can be interfered with or blanketed by other and stronger waves released at strategic points.

As respondent is attacking the constitutionality of a revenue law, the burden rests quite heavily upon it to establish the facts upon which it bases its claim that the statute is, as to respondent, invalid. Weaver v. Palmer Bros. Co., 270 U. S. 402 (410); Detroit International Bridge Co. v. Corporation Tax Appeal Board, 287 U. S. 295: St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350; Interstate Busses Corporation v. Holyoke S. R. Co., 273 U. S. 45. Statutes providing for the raising of revenue required by the state in carrying on its functions are vital to its welfare, and a person, natural or artificial, should not be declared exempt from the payment of a tax required of business generally, unless it clearly appears that the constitution and laws of the United States (or of the state) require such exemption.

Referring to the tax imposed by the legislature on commercial activities, from which respondent claims that it is exempt, this court, in the case of State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 P. (2d) 91, said:

"These commercial businesses are peculiarly dependent upon the state for protection in order that they may be carried on successfully, and they, more than all others, are responsible for, and receive the benefit of, that which the state expends in maintaining peace and order and the safety of private property."

[fol. 34] The tax levied is for revenue, not regulation. Pacific Tel. & Tel. Co. v. Seattle, 172, Wash. 649, 21 P. (2d) 721.

The statute here in question does not levy a license tax, nor a tax based upon corporate stock, but imposes a tax, by way of an excise, upon business activities or functions, the tax to be computed by figuring a percentage of the gross income received by the taxpayer. Payment of the tax is not a prerequisite to the right to engage in business, save

in so far as process to enforce payment of a delinquent tax might interfere with the taxpayer's affairs. In passing upon such questions as are here presented, courts pay less attention to form than to substance, and also consider the operation of a law as applied and enforced by the state authorities.

It must now be considered whether or not respondent's business is, from the standpoint of the tax sought herein to be enjoined, interstate, or whether, for the purposes of the statute in question, it should be held to be an intrastate business and subject to payment of the tax. Of course, a business may be, to some extent, interstate in its nature and still not come within the purview of the commerce clause of the Federal constitution. Many news papers circulate beyond state lines, carrying their advertising indiscriminately to all readers, but would scarcely, for that reason, be classified as engaged in interstate commerce. It has been held that a business consisting of representing merchants in placing with publishers advertisements in magazines which are published and distributed throughout the United States, is not interstate commerce, although the circulation and distribution of the magazines themselves be such commerce. Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U. S. 436. An advertising billboard might be so placed as to carry its message to persons beyond the boundary of the state in which it was located, but [fol. 35] the maintaining of such an advertising medium would scarcely be classified as interstate business. There are other similar instances. Because of the many recent taxing statutes, whereby the several states seek to raise necessary additional revenue, the question of what constitutes interstate commerce, considered from the standpoint of such revenue acts, has been of late years presented frequently and from new angles. It must always be remembered that the regulation by a state of an interstate business is one thing; the raising of revenue by a state by levying taxes is another and, to some extent at least, a different thing. We are not here concerned with the levying of an ordinary property tax. Respondent does not question any tax levied by the state of Washington upon its tangible property, but contends that, by seeking to collect a tax based upon the gross revenue which it receives from its broadcasting station, the state is laying a burden upon interstate commerce

and seeking to exact a payment which it has no right to demand.

It is not here contended that respondent's business constitutes a governmental agency, and for that reason cannot be taxed. That question has been suggested in other cases, but is not here urged, respondent relying solely upon the proposition that the tax to which it objects is a burden upon interstate commerce. Respondent's business necessarily falls into two classes—broadcasting for which it receives compensation, and that for which it receives nothing. The tax here in question is, of course, no burden upon respondent's business, in so far as its uncompensated activities are concerned. No question is here presented, then, exactly analogous to cases in which the right of the state, or a subordinate agency thereof, to demand payment of a license fee as a prerequisite either to operating a broadcasting station or owning a receiving set, was considered. [fol. 36] Neither is the act under attack any burden upon the use of respondent's stations, either by itself for its own purposes, or by those to whom the courtesy of the station is donated. The tax which appellants seek to collect is a direct burden upon the business of respondent only in so far as it derives an income from leasing its stations to others for compensation.

The Supreme Court of the United States has held that a state tax which only indirectly or remotely burdens interstate commerce is not obnoxious to the constitutional provision relied upon by respondent. Federal Compress etc. Co. v. McLean, 291 U. S. 17; Edelman v. Boeing Air Transport, Inc., 289 U. S. 249; Hall v. Geiger-Jones Co., 242 U. S. 539. In this connection, the Supreme Court of the United States, in the case of U. S. Fidelity & Guaranty Co. v. Kentucky, 231 U. S. 394, upheld an excise or privilege tax levied by the state, the tax being resisted upon the ground that it was a direct interference with interstate commerce. In the course of its opinion, the court said:

"To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. We do not think the present is such a case."

Respondent's complaint contains no allegation to the effect that as a part of its business it transmits special point

to point messages. This branch of radio service, therefore, need not be considered. Neither does respondent contend that its facilities are leased to anyone for the purpose of conducting scientific experiments. It clearly appears from the complaint that respondent's stations are used only for commercial broadcasting, and that branch of the art is the only one with which we are here concerned.

A very similar question was before the supreme court of Georgia in the case of City of Atlanta v. Oglethorpe Univer- [fol. 37] sity, 178 Ga. 379, 173 S. E. 110. In the case cited, the plaintiff sought an injunction against the enforcement by the city of an ordinance providing for the payment to the city of a business license required by the city from those following certain occupations or businesses. The plaintiff contended, inter alia, that in conducting a broadcasting station, it was engaged in interstate commerce, and that the city could not exact payment of a business license based upon the fact that plaintiff owned and operated a broadcasting station. The court held that broadcasting was not an interstate business, even though the magnetic waves discharged from plaintiff's station passed beyond the boundaries of Georgia. The court considered that the broadcasting business was almost altogether intrastate, and that its income was received from what should be called intrastate business. The court properly considered the basic facts of the situation, rather than those which were incidental thereto.

The Supreme Court of the United States, in the case of Utah Power & Light Co. v. Pfost, 286 U. S. 165, held valid an act of the legislature of Idaho levying a license tax on plants for the production of electrical energy as levied against a corporation which maintained a power plant in Idaho for the generation of electricity, most of the product being disposed of in the state of Utah. The court held that the tax was not a burden upon interstate commerce, saying, in the course of its opinion:

"We are satisfied, upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the

manufacture. Cornell v. Coyne, 192 U. S. 418, 428-429. 'Commerce succeeds to manufacture, and is not a part of it.' United States v. E. C. Knight Co., 156 U. S. 1, 12.' ''

[fol. 38] It has been held that the state may levy a tax based upon the intrastate gross receipts of corporations selling natural gas, although the product was brought without interruption from its source in another state to the place of consumption in the state levying the tax. It was held that the reduction of the pressure under which the gas moved from a higher to a lower rate as the gas moved in the local mains was equivalent to the opening of an original package, and that, therefore, the distribution of the gas to the consumers was essentially a local business, and that the tax did not burden interstate commerce. East Ohio Gas Co. v. Tax Commission, 283 U. S. 465. It is, of course, true that the carrying of gas or oil through a state constitutes interstate commerce. Ozark Pipe Line Corporation v. Monier, 266 U. S. 555. But in our opinion the principal involved in the case cited and other authorities to the same effect is not controlling here.

The cases cited are important as indicating that, in passing upon the validity of state statutes levying taxes, the Supreme Court of the United States gives the states the benefit of the doubt and holds the acts valid unless they beyond question directly burden interstate commerce.

In the case of Henderson Bridge Co. v. Kentucky, 166 U. S. 150, it appeared that the bridge company, a Kentucky corporation, owned railroad trackage and a bridge between the states of Kentucky and Indiana. It was held that a tax levied by the state of Kentucky upon the corporation's franchise was valid. The court distinguished between the levying of such a tax, citing Central Pacific Railroad v. California, 162 U. S. 91, and the attempted regulation by the state of tolls for use of the interstate bridge. Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204. Considering the matter at issue, the court summed up the question as follows:

[fol. 39] "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by persons and corporations which paid the bridge company tolls for the privilege of using the

bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted. This very question was decided in Erie Railroad v. Pennsylvania, 158 U. S. 431, 439, where it was said: 'It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public mantenance.' The only franchises treated here as the subject of taxation were those granted by the state of Kentucky. So far as the state of Indiana could be said to have conferred any franchise upon the company, it was a franchise that inhered in that portion of the structure that was within the state of Indiana, the value of which was not included in the tax complained of."

In the recent case of Detroit International Bridge Co. v. Corporation Tax Appeal Board, 79 Sup. Ct. Adv. Opinions 337, the court upheld the tax sought to be levied by the state of Michigan against the bridge company for the privilege of exercising its franchise and of transacting its business within the state. The tax was levied by way of an annual fee upon each dollar of corporation paid-up capital and surplus; property or capital located without the state to be excluded, as well as such of the capital as was represented by property exclusively used in interstate commerce. The tax was characterized by the supreme court of Michigan as "a privilege tax imposed as an incident to the right to be a corporation and exercise corporate functions by means of paid-up capital and surplus." The powers of the corporation were by its charter limited to the ownership and operation of a highway bridge crossing the Detroit river from Detroit, Michigan, to Sandwich, Ontario, operated as a toll bridge, from which tolls the corporation derived its sole income. The supreme court of Michigan upheld the validity of the tax as against the bridge company, which, on appeal to the [fol. 40] Supreme Court of the United States, argued that, as its only power under its charter was to engage in foreign commerce, a state tax for the privilege of so doing

would burden such commerce and offend the Federal constitution. It appeared that the bridge company itself conveyed no persons or goods across the international boundary; it collected toll from persons using the bridge; the company merely provided "an instrumentality which others may use in conducting foreign commerce." The Supreme Court, quoting with approval from its opinion in the case of Henderson Bridge Co. v. Kentucky, supra, held that the owner of an interstate bridge collecting compensation from persons using the same was not engaged in interstate commerce, and affirmed the decree of the supreme court of Michigan upholding the validity of the tax.

Appellants argue here that, if the owner of an international or interstate bridge, who rents that facility to persons engaged in interstate commerce, is not itself engaged in such commerce, it should be held that the owner of a broadcasting station, who rents to others the facilities thereby afforded, should not be held, for the purposes of the statute now before us, to be engaged in interstate commerce. The surrounding ether may be likened to the bridge and, while respondent does not lease the ether, it does lease a device which enables its patron to use the ether as a "bridge" or medium of communication between the station and such receiving appliances as may be so attuned as to reproduce the message released through space.

Respondent seeks to distinguish the Detroit bridge case by calling attention to the fact that the tax there in question was levied upon the privilege of conducting business but was not levied upon the business itself. There is, of course, that difference between the question decided in the case cited and that which must be determined here. The Supreme Court [fol. 41] of the United States, however, has said that the ownership of an international bridge and the collection of tolls from persons who use the same does not constitute interstate commerce. While, of course, the language of the decision must be limited to the question which was presented, and the case cited is, therefore, not controlling here, the reasoning is most persuasive, and the language used applies with great force to the situation here presented.

Respondent cites several authorities which clearly hold that a statute purporting to levy an occupation tax upon an interstate business constitutes a burden upon interstate commerce and is obnoxious to the Federal constitution.

Sprout v. City of South Bend, 277 U. S. 163; Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326. Respondent also calls attention to the fact that the tax which was sustained by the Supreme Court of the United States in the case of Henderson Bridge Co. v. Kentucky, supra, was a property tax, while the tax here in question is not a property, but an occupation, tax. State ex rel. Stiner v. Yelle, supra.

Respondent relies upon the case of Van Dusen v. Department of Labor and Industries, 158 Wash. 414, 290 Pac. 803, in which it was held that a workman engaged in removing a telephone switchboard, located in a room forming part of the plant of a broadcasting station, was engaged in interstate commerce, and was not within the protection of the industrial insurance law. The telephone switchboard was an integral part of the apparatus used in the station in the course of its broadcasting operations, and was being removed for the purpose of installing an ice machine which was to be used in cooling water for use in connection with the radio tubes. It was held that the removal of the switchboard was "a work so closely related to interstate com-[fol. 42] merce, in which the station was engaged, as to be a part of such commerce."

Respondent also relies upon the case of Station WBT v. Poulnot, 46 F. (2d) 671, in which the United States district court enjoined a sheriff from enforcing collection of a tax sought to be collected pursuant to an act of the legislature of South Carolina requiring a payment by each owner of a radio receiving set, the amount of the tax varying somewhat upon the nature of the set owned. It was not sought to levy the tax as a part of the general system for the taxation of property, the law evidently contemplating the collection of a license tax for the privilege of using the device. The court held that a radio receiving set is an instrument used in interstate commerce, and that a state could not require payment of a license fee by the owner of such a set as a prerequisite to use thereof. The court also held that the law could not be sustained as a matter of local regulation, as that sphere had been preempted by the Federal government.

The converse of the proposition last discussed is found in the opinion of the United States district court for a Kentucky district in the case of Whitehurst v. Grimes, 21 F.

(2d) 787. This was an action brought to restrain a chief of police from enforcing collection of a license which a municipal ordinance required to be paid by any person operating a broadcasting station. The court held that the business of radio broadcasting was in its nature interstate, that the field of regulation and control of such stations had been preempted by the United States, and that the municipal ordinance was void, as an interference with interstate commerce.

It cannot be denied that radio broadcasting is, in its sphere of activity, essentially interstate and international. It has been held in the cases above referred to, probably [fol. 43] upon sound reason, that the use by a person of his own station constitutes interstate commerce, as does the setting up and operation of a receiving set. In the Van Dusen case, supra, this case properly held that a workman engaged, as was Mr. Van Dusen, in making alterations in a broadcasting station was engaged in interstate commerce. That case would be authority for a holding that a workman employed in building the bridge between Detroit and Canada would also have been engaged in international commerce. Such a bridge is undoubtedly a facility used in connection with foreign commerce, but the Supreme Court of the United States has held that the owner of the structure, in charging tolls for its use, is not engaged in such a business.

It seems clear that the Supreme Court of the United States, while protecting to the fullest extent the right of the Federal government under the constitution to regulate interstate and international commerce, is, on the other hand, inclined to hold that the respective states, is so far as their right to raise revenue by taxation is concerned, should be accorded as liberal a construction of the Federal constitution and laws as is consistent with the preservation of every right necessary to enable the Congress to protect interstate commerce against interference. A discriminatory tax would undoubtedly be held to constitute such interference, but, from the standpoint of justice and equity, and a proper support of government, every reason exists for as general a distribution of a fair burden of taxation as can possibly be accomplished.

In the case of Sprout v. City of South Bend, supra, the Supreme Court of the United States held invalid a city ordi-

nance requiring payment of a license fee by the operator of a motor bus carrying passengers between South Bend and a point in Michigan. The operator of the stage was, of [fol. 44] course, engaged in interstate commerce, himself carrying passengers from one state to another, and the ordinance was, naturally, held void. In the earlier case of Philadelphia & Southern Steamship Co. v. Pennsylvania, supra, the same court held that a state statute levying a tax upon the receipts of a corporation engaged in interstate and foreign commerce was obnoxious to the Federal constitution. In these and other similar cases it was, of course, unquestionably the fact that the person resisting the levy of the tax was actually engaged in interstate commerce.

In so far as the conduct of its business affairs by respondent is concerned, it is all purely intrastate. Its plants are entirely within the state of Washington; its contracts provide only for the use of its stations and the recognized facilities thereof, including their power to project electromagnetic waves. Respondent completes its contracts with its patrons when it turns over its stations to them or to their agents, and it is none of respondent's concern, as long as the stations function properly, where or by whom the waves or vibrations which it causes to be released are received and transmuted into sound. Respondent completes its contract and earns its compensation regardless of whether five stations or five thousand receive the message. In this connection, the holding of the supreme court of Georgia in the case of City of Atlanta v. Oglethorpe University, supra, is in point, and we agree with that court in holding that, as a practical proposition, broadcasting similar to that with which we are here concerned is an intrastate business, considered in connection with such a tax as is here in question. As to whether or not a state could exact a license fee for the privilege of operating a broadcasting station, we express no opinion.

The tax which is here sought to be restrained is an excise or occupation tax, paid very generally by persons engaged [fol. 45] in business in this state. It is not contended that the tax, in so far as the same affects respondent, is discriminatory, capricious or unfair. Respondent relies exclusively upon a supposed constitutional exemption from the payment of such a tax. Assuming that the state could not exact a license fee for the privilege of operating a broad-

casting station, as the use thereof by the owner himself, or by his representative, might well be held to be interstate commerce (clearly a point to point broadcast, the points being in two different states, would constitute interstate business); assuming further that the state could not exact a fee by way of a license for the privilege of owning a receiving set or device, as such an appliance in most instances would be used in connection with broadcasts released in other states, nevertheless, bearing in mind the principles above stated and the authorities cited, we hold that the state may levy the tax here in question, computed upon the gross amount which respondent receives for the rental of its facilities. In so far as respondent itself uses its stations, it pays no tax, and in so far as it allows others to use them for compensation, it is not engaged in interstate commerce. Detroit International Bridge Co. v. Corporation Tax Appeal Board, supra.

If it be that the tax does affect interstate commerce, it does so merely incidentally, and does not constitute a burden thereon to such an extent as to require a holding that the tax is void as to respondent as obnoxious to the commerce clause of the Federal constitution.

The judgment appealed from is reversed, with instructions to the trial court to sustain appellant's demurrer.

Beals, J.

We concure: Tolman, J. Geraghty, J. Main, J.

DISSENTING OPINION

MILLARD, C. J., dissenting:

I am convinced that radio broadcasting is interstate commerce, therefore the state may not levy an occupation tax against respondent. The judgment should be affirmed.

Millard, C. J.

[fol. 46] IN SUPREME COURT OF WASHINGTON

Department One

No. 25302

FISHER'S BLEND STATION, INC., Respondent,

v.

THE STATE TAX COMMISSION ET AL., Appellants

OPINION AMENDING OPINION—Filed Oct. 17, 1935

Per CURIAM:

Our attention having been called to the fact that the parties to this proceeding in effect agreed that the matter should be submitted to the trial court as upon an agreed statement of facts, and that, consequently, the judgment of the trial court was rendered upon the merits, the opinion heretofore rendered herein (82 Wash. Dec. 123) is hereby amended as follows:

The last paragraph of the opinion, which reads: "The judgment appealed from is reversed, with instructions to the trial court to sustain appellants' demurrer," will be stricken and there is hereby substituted in its place the following: The judgment appealed from is reversed, with instructions to the trial court to enter judgment in appellants' favor denying respondent any relief and dismissing the action.

[fol. 47] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER DENYING PETITIONS FOR REHEARING—Filed Sept. 13, 1935

The court having considered the petition of respondent and the petitions of various amici curiae for a rehearing herein;

It is ordered that the petitions be and they hereby are denied.

Dated this 13th day of September, 1935.

By the Court.

John F. Main, Acting Chief Justice.

[File endorsement omitted.]

[fol. 48] IN SUPREME COURT OF WASHINGTON

No. 25302

Thurston County No. 15138

FISHER'S BLEND STATION, INC., a Corporation, Respondent,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and THOMAS S. HEDGES, et al., Members of Said Commission, Appellants

JUDGMENT—October 19, 1935

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 19th day of October A. D. 1935, on motion of G. W. Hamilton, Attorney General, of counsel for appellants, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby reversed with instructions to the trial Court to enter judgment in appellants' favor denying respondent any relief and dismissing the action and that the said Tax Commission of the State of Washington, have and recover of and from the said Fisher's Blend Station, Inc., the costs of this action taxed and allowed at Fifty Five and 05/100 ($55.05) Dollars, and that execution issue therefor.

And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Journal 33. Supreme Court of Washington. Page 24.

[fol. 49] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Nov. 26, 1935

The petitioner and appellant assign the following Errors in the record and proceedings in this cause:

(1) The Supreme Court of the State of Washington by its judgment erred in reversing the decree of the Superior

Court for Thurston County which granted a permanent injunction to appellant, and against appellees, and adjudicated that the statute, to wit, the Occupation Tax Act (Chap. 191, Laws of 1933), the enforcement of which, against appellant, was enjoined, contravenes and is repugnant to Section 8, Article I, (the Commerce Clause) of the Constitution of the United States in that as applied to appellant it is a tax or excise upon the privilege of engaging or continuing to engage in interstate and foreign commerce and amounts to a direct burden thereon.

(2) The Supreme Court of the State of Washington erred in entering judgment in favor of appellees denying appellant any relief and dismissing the action and in failing to enter judgment that appellant is entitled to the relief sued for in that the enforcement against appellant of the statute of the State of Washington sought to be enjoined, to wit, the Occupation Tax Act, contravenes and is repugnant to Section 8, Article I, the commerce clause, of the Constitu- [fols. 50-59] tion of the United States, in that said statute, so enforced, is a tax or excise upon the privilege of engaging or continuing to engage in interstate and foreign commerce and amounts to a direct burden thereon.

(3) The Supreme Court of the State of Washington erred in holding that appellant, in the conduct of its business of radio broadcasting, is engaged in intrastate and not interstate commerce for the reason that the record shows appellant is engaged solely in interstate commerce and such holding has no basis in fact and is in direct conflict with the facts well pleaded in the record and admitted by stipulation of the parties.

(4) The Supreme Court of the State of Washington erred in holding that appellant leases or rents its facilities and "turns over" its stations for compensation to its patrons or their agents, for the reason that such holding has no basis in fact and is in direct conflict with the facts well pleaded in the record and admitted by written stipulation of the parties.

(5) The Supreme Court of the State of Washington erred in holding that the Act in question as applied to appellant does not affect interstate commerce except incidentally and that it does not constitute a burden thereon and in failing to hold that the enforcement of the Occupation Tax Act

against appellant constitutes a direct burden on interstate commerce, as defined by and in accordance with the decisions of the Supreme Court of the United States.

Wherefore, on account of the Errors hereinabove assigned, petitioner prays that the said judgment of the Supreme Court of the State of Washington, dated the 19th day of October, 1935, in the above entitled cause be reversed and judgment be rendered in favor of this appellant.

Dated this 26th day of November, 1935.

R. J. Venables, Donald G. Graham, James B. Howe, Attorneys for Appellant.

[fol. 60] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed Nov. 26, 1935

To the Chief Justice of the Supreme Court of the State of Washington:

Your petitioner, Fisher's Blend Station, Inc., a corporation, respectfully shows:

That your petitioner is the appellant in the above entitled cause.

That on August 28, 1933, your petitioner filed its complaint against the appellees above named in the Superior Court of the State of Washington for Thurston County, alleging that a statute of the State of Washington, to-wit, the Occupational Tax Act (Chapter 191, Laws of 1933, being Sections 8326-1 to 8326-30 inclusive, of Remington's Compiled Statutes of Washington), which purported to tax the gross income of radio broadcasting stations, was repug-
[fol. 61] nant to and in conflict with Section 8, Article I, of the Constitution of the United States, being the so-called commerce clause of said Constitution. Equitable grounds were alleged for and the issuance of an injunction was requested against the appellees above named, enjoining and restraining them from enforcing said Occupational Tax Act against petitioner. That an injunction pendente lite

was granted by said Superior Court, and thereafter a demurrer was filed and, after consideration, was overruled by said Superior Court; thereupon, the parties stipulated that the cause be submitted to said Superior Court for final determination upon the allegations of the complaint, as amended, as an agreed statement of facts, and thereafter said Superior Court entered its order permanently enjoining and restraining the appellees from enforcing, as against petitioner, said Occupational Tax Act, and from claiming or collecting any taxes thereunder from petitioner; an appeal from said final order granting a permanent injunction was taken to the Supreme Court of the State of Washington, and said Supreme Court rendered its opinion on said appeal reversing the judgment of the lower court and instructing it to enter judgment in appellant's favor, denying petitioner any relief and dismissing the action. The opinion of said Supreme Court in its entirety dealt with the question of the validity of said statute in respect to the Constitution of the United States, and in effect found that said statute, as enforced against the petitioner, was not in conflict with or repugnant to the said commerce clause of the Constitution of the United States, and that its said enforcement did not constitute a burden upon interstate commerce. Within the time allowed by law petitioner filed its petition for rehearing, and thereafter said petition for rehearing was denied, and the final judgment of said Supreme Court denying the petitioner any relief and ordering a dismissal of the action was entered on October 19, 1935.

That the Supreme Court of the State of Washington is the highest court of said state in which a decision in this suit can be had.

That in said cause there is drawn in question the validity [fol. 62] of a statute on the ground that said statute is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates Section 8, Article I, of the Constitution of the United States.

That, therefore, in accordance with Section 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit, under Section 237(a) of the Judicial

Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of Washington, the highest court of said state in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of Washington may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Washington, under his hand and the seal of said court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the cost bond tendered by the petitioner be approved.

Dated this 26th day of November, 1935.

R. J. Venables, Donald G. Graham, James B. Howe,
Attorneys for Petitioner.

[fol. 63] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed Nov. 26, 1935

The petition of Fisher's Blend Station, Inc., a corporation, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and statement as to jurisdiction, all as

provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated the 19th day of October, 1935, of the Supreme Court of the State of Washington, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Washington shall, within sixty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said court, a true [fol. 64] copy of the material parts of the record herein, which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellant shall give a good and sufficient cost bond in the sum of one thousand and no/100 ($1000.00) Dollars, that said appellant shall prosecute said appeal to effect and answer all costs if it fails to make its plea good.

Dated this 26th day of November, 1935.

William J. Millard, Chief Justice of the Supreme Court of the State of Washington.

[fols. 65-67] Bond on appeal for $1,000.00, approved and filed Nov. 26, 1935, omitted in printing.

[fols. 68-71] Citation, in usual form, showing service on G. W. Hamilton and E. P. Donnelly, filed Nov. 26, 1935, omitted in printing.

[fol. 72] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION FOR TRANSCRIPT OF RECORD—Filed Nov. 26, 1935

It is hereby stipulated between Fisher's Blend Station, Inc., a corporation, appellant above named, and The Tax

Commission of the State of Washington and Thomas S. Hedges and T. M. Jenner, members of said Commission, the appellees above named, by and through their respective counsel, as follows:

That the Clerk of the Supreme Court of the State of Washington is hereby instructed to prepare the record on appeal in the above entitled cause, and that the following papers shall be included in and shall constitute said record on appeal:

1. Complaint.
2. Injunction pendente lite.
3. Demurrer.
4. Stipulation as to Additional Facts.

[fol. 73] 5. Order Overruling Demurrer and Judgment and Decree Granting Permanent Injunction.

6. Notice of Appeal.
7. Opinion of the Supreme Court of the State of Washington.
8. Per Curiam Opinion of the Supreme Court of the State of Washington.
9. Order Denying Petition for Rehearing.
10. Judgment of the Supreme Court of the State of Washington.
11. Assignment of Errors.
12. Statement as to Jurisdiction.
13. Petition for Appeal.
14. Order Allowing Appeal and Fixing Cost Bond.
15. Cost Bond.
16. Citation.
17. Statement directing attention to United States Supreme Court, Rule 12.
18. Proof of service of papers required by United States Supreme Court, Rule 12.
19. Stipulation for Transcript on Appeal.
20. Clerk's Certificate.

R. J. Venables, Donald G. Graham, James B. Howe, Attorneys for Appellant. G. W. Hamilton, Attorney General, E. P. Donnelly, Assistant Attorney General, Attorneys for Appellees.

[fol. 74] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 75] SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed Dec. 11, 1935

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated this 26th day of November, 1935.

R. J. Venables, Donald G. Graham, James B. Howe, Attorneys for Appellant.

Service acknowledged this 26th day of November, 1935.

E. P. Donnelly, Asst. Atty. Genl., Attorneys for Appellees.

[fol. 76] [File endorsement omitted.]

Endorsed on cover: File No. 40,182. Washington Supreme Court. Term No. 628. Fisher's Blend Station, Inc., appellant, vs. The Tax Commission of the State of Washington et al. Filed December 11, 1935. Term No. 628, O. T., 1935.